IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

RSA No. 211 of 1996

Date of Decision: 3rd August, 2006.

Milap Chand — Appellant

Versus

Nirmal Raj and others — Respondents

Coram

The Hon'ble Mr. Justice V.K.Gupta, C.J.

Whether approved for reporting[1]?

For the appellant: Mr.Bhupender Gupta, Sr. Advocate, with Mr.Ajit Jaswal, Advocate.

For the respondents: Mr.O.P.Sharma, Sr. Advocate, with Mr.K.R.Kashyap, Advocate.

V.K.Gupta, C.J. (Oral)

In this appeal notice of motion was issued on 15th July, 1996. After the service was effected on 11th September, 1996 the appeal was 'admitted', but without formulating any substantial question of law.

Learned counsel for the parties agree that while modifying the aforesaid order dated 11th September, 1996, I should today pass formal order of admitting the appeal in terms of sub-sections (3) and (4) of Section 100 read with Order 41 Rule 11 as well as Order 42 Rule 2, CPC. The parties further submit

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[1] Whether the reporters of Local Papers are allowed to see the Judgment?

that after formally admitting the appeal today by formulating the substantial questions of law, the appeal be heard for final disposal today itself.

Based upon the aforesaid submissions and agreement of the learned counsel for the parties, the appeal is admitted on the four substantial questions of law formulated and annexed with the memo of appeal.

Heard final arguments of the parties. Mr. Bhupender Gupta, learned senior counsel as well as Mr.O.P.Sharma, learned senior counsel, have both addressed arguments in details.

The subject matter of the controversy in this case revolves around the existence, execution, validity and correctness of two Wills. Whereas plaintiffs-respondents No.1 to 4 accepted the fact in the plaint that Will dated 22nd August, 1989 (Ex.DW-2/A) was actually executed by Tikmi Devi, testatrix, it was at the same time claimed that this Will was based upon fraud and misrepresentation. The plaintiffs further claimed in the plaint that Tikmi Devi, testatrix had executed a final Will on 15th April, 1990 (Ex.P1), through which she bequeathed her property in equal shares to the plaintiffs as well as defendant No.1-appellant. The plaintiffs accordingly had claimed that the mutation attested in favour of

defendant No.1-appellant based upon Will Ex.DW-2/A was bad and should be set aside.

The defendants in the joint written statement filed in answer to the plaint had disputed the very execution and the existence of the Will Ex.P1 and had specifically set up a case that the Will Ex.DW-2/A was duly executed and registered and that by virtue of this Will the testatrix had bequeathed the property in favour of defendant No.1 only.

The following issues were framed by the learned trial Court:-

"1) Whether Smt.Tikmi Devi executed a last valid Will dated 15.4.1990 in favour of the plaintiff, defendant No.1 and 3 as alleged? OPP

2) Whether mutation No.2379 dated 27.7.1991 on the basis of earlier Will dt. 22.8.89 has illegally been attested, as alleged? OPP

3) Whether the suit is properly valid for purpose of Court fee and jurisdiction, as alleged? OPD

4) Whether the plaintiff is not in possession of the suit property? OPP

5) Whether Smt.Tikmi executed a valid Will dated 22.8.1989 in favour of defendant No.1, as alleged? OPD

6) Relief"

The learned trial Court as well as the learned first Appeal Court decided Issue No.1 against

the plaintiffs by clearly holding, based upon appreciation of evidence that the plaintiffs had failed to prove the due execution of the Will Ex.P-1 because both the Courts were of the opinion that this Will in all probabilities was not at all executed by the testatrix and that this was a forged and fake document. In so far as Issue No.5 is concerned, whereas the trial Court decided this issue in favour of defendant No.1 by holding that Will Ex.DW-2/A had validly been executed and being a registered document no suspicion can be cast about its validity and correctness based upon its due execution and registration, the learned Appeal Court decided this issue against defendant No.1-appellant by holding as under:-

> **"…….however, the findings of the learned trial Court that the Will Ex.DW2/A has been proved on record are not sustainable, as this Will also has not been proved on the record of the case. Both the Wills are the result of fraud and shrouded with suspicious circumstances. ……..Findings of the learned trial Court to the effect that the Will ex.DW2/A is duly proved are thus set aside and quashed……"**

The plaintiffs did not file any appeal against the impugned judgment of the learned Additional District Judge dated 24th April, 1996, which has been assailed by defendant No.1-appellant.

The plaintiffs also did not prefer any cross-objections to the said impugned judgment or the part of the judgment in which finding upon Issue No.1 has been confirmed by the learned lower Appeal Court.

In so far as the challenge to the Will Ex.DW-2/A is concerned, the only averment is contained in para 4 of the plaint, which reads thus:-

> **"That the defendants No.1 and 2, who are very quarrelsome nature, got the mutation No.2379 of Phati Soil, dated 27.7.91, attested in the name of the defendant No.1, on the basis of the alleged will dated 22.8.89, which was obtained by him playing fraud and mis-representation upon the deceased Smt.Tikami, and which will stands revoked, while the mutations of other phaties have also been got entered, though the same are not yet attested and on the basis of which the defendants since 27.7.91, have started denying the right, title or interest of the plaintiff over the suit land and threatening to dispossess and oust the plaintiff therefrom, for which the defendants have got no right, or interest. The plaintiff and defendant No.1 have inherited the estate of the deceased Smt.Tikami in equal share on the basis of the aforesaid last will barring the aforesaid two fields bequeathed in favour of the proforma defendant No.3. The plaintiff is not thus bound by the aforesaid mutation No.2379, attested against law and facts."**

Order 6 Rule 4, CPC reads thus:-

"4.<u>Particulars to be given where necessary</u>.- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

No particulars of misrepresentation or fraud were provided either in para 4 or elsewhere in the plaint. Based upon this simple proposition the plaintiffs were estopped at the very threshold from even alleging or establishing that the Will Ex.DW-2/A was vitiated or was obtained by playing fraud and misrepresentation upon the deceased testatrix. Even if this aspect is ignored, I have no hesitation in holding that the finding on Issue No.5 by the learned first Appeal Court is totally and absolutely perverse because it is based on a total misreading of evidence. Actually, it can be said safely that this finding is based on no evidence at all. The only reliance sought by the learned Appeal Court in arriving at its finding on Issue No.5 is the testimony of PW-1 Shakuntla Devi. In her statement she says that the testatrix Tikmi Devi told her husband that defendant No.1 had got executed from her

Will Ex.DW-2/A by telling her that he wanted her to revoke the testatrix's earlier Will executed in the year 1988 so as to ensure that he gets a proper share in her property. Now this statement of PW-1 is based upon on pure hearsay inasmuch as she quotes the testatrix having conveyed this to her husband. She does not say in her statement that her husband conveyed this fact to her. This aspect of the matter is totally missing in her statement. This apart, PW-1 Shakuntla Devi is the wife of the sole deceased plaintiff Mohan Lal (the sole plaintiff had died during the pendency of the suit and is represented by respondents No.1 to 4). Shakuntla Devi, therefore, is an interested witness being the wife of plaintiff Mohan Lal. Not only that, in the Will Ex.P-1 she is shown to be a beneficiary. Therefore also she is not only an interested witness but a party in the suit. Her statement is totally uncorroborated because none of the other two witnesses, namely, Chuni Lal and Khub Ram have said a word about this aspect of the matter.

As against the aforesaid evidence led by the plaintiffs, we have before us unimpeachable evidence of two absolutely independent witnesses of defendant No.1, being DW-3 Niranjan Dass, the scribe of the Will and DW-4 Krishan Gopal, Advocate, who was one of the two marginal witnesses of the Will. Both are

independent witnesses. Both have stated that the Will was scribed at the instance and on the instructions of testatrix and after it was written down it was explained to the testatrix, who understood its contents and admitted and accepted them to be correct. The Will Ex.DW-2/A was duly registered as per the testimony of DW-2 Sudhir Gautam, Registration Clerk in the office of Sub-Registrar, Kullu.

Based upon the aforesaid discussion, I have no doubt in my mind that finding on Issue No.5 by the learned first Appeal Court is perverse based as it is on a total misreading of evidence. Actually it can also be said that this finding is based on no evidence at all.

The appeal accordingly is allowed. The judgment of the learned first Appeal Court under challenge in this appeal is set aside and the judgment of the learned trial Court dated 30th September, 1995 in Civil Suit No.230 of 1991 is maintained and upheld. No order as to costs.

3rd August, 2006 **(V.K.Gupta)**
(C) **Chief Justice**